

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Local Exchange Carrier's Rates,) CC Dkt. No. 93-162
Terms and Conditions for Expanded) Phase I
Interconnection for Special Access)

COMMENTS IN SUPPORT OF PETITION FOR RECONSIDERATION

The Ameritech Operating Companies (Ameritech),¹ pursuant to § 1.429 of the Federal Communications Commission's (Commission) rules, respectfully submit these comments supporting BellSouth's Petition for Reconsideration (PFR) of the Commission's order on local exchange carrier's (LECs) rates for expanded interconnection for special access.² In its PFR, BellSouth argues that the Commission exceeded its statutory authority by prescribing interim special access interconnection rates under §§ 154(i) and 205 of the Communications Act. Specifically, BellSouth argues that the Commission's prescription of interim rates is inconsistent with the statutory scheme established in the Communications Act under §§ 204 and 205 of the Act. For the reasons stated herein, Ameritech supports BellSouth's Petition.

I. **Background**

As outlined in BellSouth's PFR, in the Interconnection Tariff Order, the Commission found that the LECs' rates for special access interconnection were not justified. However, the Commission also found that it had insufficient

¹ The Ameritech Operating Companies are: Illinois Bell Telephone Company, Indiana Bell Telephone Co., Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.

² Local Exchange Carrier's Rates, Terms, and Conditions for Expanded Interconnection for Special Access, CC Dkt No. 93-162, Phase I, FCC 93-493, released November 12, 1993 (Interconnection Tariff Order).

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information on which to prescribe a permanent rate. Therefore, the Commission prescribed 'interim' rates and also established a two-way mechanism designed to protect both the ratepayer and LECs. Specifically, the Commission determined that under the two-way mechanism LECs would be allowed to recoup revenues if the prescribed interim rates were found to be below just and reasonable rates. Correspondingly, under the two-way mechanism, ratepayers would receive refunds if the prescribed interim rates were found to be above the just and reasonable level.³

In its PFR, BellSouth challenges the interim prescription on two grounds. First, BellSouth argues that the Commission's authority under § 204(a) – which is the provision under which the Commission initiated the investigation of the special access interconnection rates -- is limited. In this regard, the BellSouth argues that § 204(a) does not provide for this 'interim' prescription. Rather, BellSouth argues that § 204(a) requires that the Commission allow the filed rates go into effect after the end of the suspension period, subject to an accounting order. It does not grant the Commission authority to prescribe rates.

Second, BellSouth argues that the Commission exceeded its authority under §§ 154(i) and 205 when it prescribed interim special access interconnection rates. In this regard, BellSouth argues that § 205 of the Communications Act requires that the Commission prescribe only just and reasonable rates after an opportunity for investigation. Since the Commission has acknowledged it is unable to determine a just and reasonable rate for special access interconnection and is continuing its investigation, the prescription of an interim rate is contrary to § 205 of the Act which requires the prescription of only just and reasonable

³ *Id.* at ¶¶ 35-39.

rates. Therefore, BellSouth concludes that the Commission's interim prescription cannot be justified under § 154(i) of the Act.

I. Discussion

In its PFR, BellSouth demonstrates that the Commission has exceeded its statutory authority under the Communications Act. The Commission's attempt to prescribe rates while at the same time allowing refunds and recoupments improperly blends its authority to order refunds contained in § 204(a) with its authority to prospectively prescribe rates contained in § 205. As such, its order must fail.

The Court in Illinois Bell v. FCC,⁴ has already found that the Commission is not free to blend or pick and choose its authority under §§ 204 and 205. Specifically, in Illinois Bell, the Commission had ordered refunds under § 204(a) without issuing a suspension or accounting order as required by the statute. In this regard, the Commission argued that it had the authority to order refunds independent of a suspension order. In finding that the Commission had overstepped its statutory authority, the Court found that §§ 204 and 205 are based on a regulatory dichotomy. Specifically, the Court noted that § 204 provides the Commission authority to order refunds, while § 205 provides the Commission authority to prescribe rates – prospectively. Thus, the Court found that the Commission could not order refunds claiming action under § 204, when “its actions are consistent only with the section not so providing,” because such action violated the rule against retroactive ratemaking.⁵ Consequently, the Court found

We can only read the statutory language in §§ 204 and 205 as a congressional embrace of this cardinal principle [against retroactive

⁴ Illinois Bell Telephone Co., v. FCC, 966 F.2d 1478 (D.C. Cir. 1992) (Illinois Bell).

⁵ Id. at 1482.

ratemaking]. In § 205 Congress provided the mechanism for prospective relief from unreasonable rates. In § 204 it provided the mechanism for preventing an unreasonable rate from being filed, or at least from taking effect only subject to an accounting order and such further order as would be required. The one supposes prospective relief, the other the possibility of refund.⁶

The Commission's action in the Interconnection Tariff Order contains the same infirmity as the Commission's action in Illinois Bell. As noted above, while the Commission argues in the Interconnection Tariff Order that it is acting under § 205 by prescribing interim rates, the Commission also attempts to allow for refunds (or recoupments) allowed only under § 204. Thus the Commission attempts to combine its authority under § 204 and § 205. It cannot do so. The Commission must either act under § 204(a) and allow the filed special access interconnection rates to become effective subject to a suspension and accounting order, or prescribe just and reasonable rates under § 205.

Based on the forgoing, the Commission should reconsider its action prescribing interim rates set forth in the Interconnection Tariff Order and grant BellSouth's Petition for Reconsideration.

Respectfully submitted,

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⁶ *Id.*

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CERTIFICATE OF SERVICE

I, Deborah L. Thrower do hereby certify that a copy of the foregoing Comments In Support Of Petition For Reconsideration has been served on all parties on the attached service list by first class mail, postage prepaid, on this 4th day of February, 1994.

By: Deborah L. Thrower
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